



1 amend, contending Plaintiff should not be allowed to now conform  
2 his factual allegations to conform to the evidence produced  
3 during discovery.

4           Plaintiff's initial complaint, filed December 31, 2007,  
5 named as defendants Maricopa County Sheriff Arpaio, Detention  
6 Officer Barron, Detention Officer Olague, and "Nurse Jackie."  
7 Plaintiff alleges that his constitutional rights were violated  
8 when, as a pre-trial detainee, pepper spray was used on him  
9 while he was in a recreational area of the Maricopa County  
10 Towers jail. Plaintiff alleged his safety was threatened  
11 because the defendant officers improperly used pepper spray,  
12 that he was harmed by the use of the pepper spray, and that he  
13 received inadequate medical attention after this incident.

14           On January 10, 2008, Plaintiff was given leave to  
15 proceed *in forma pauperis* and Defendants were ordered to answer  
16 Count I of Plaintiff's complaint. See Docket No. 3. Count I of  
17 the complaint alleged a cause of action for violation of  
18 Plaintiff's right to be free of cruel and unusual punishment,  
19 Count II stated a cause of action for violation of Plaintiff's  
20 due process right to safety while incarcerated, and Count III  
21 alleged a violation of Plaintiff's right to equal protection of  
22 the laws. Counts II and III of the complaint were dismissed as  
23 duplicative.

24           Plaintiff timely returned service packets to the Court  
25 which were forwarded to the United States Marshal. Defendants  
26 Arpaio, Barron, and Olague waived service on or about January  
27 22, 2008. See Docket Nos. 7, 8, 9. On February 26, 2008,  
28 service was returned unexecuted with regard to "Nurse Jackie."

1 See Docket No. 13.

2           The other defendants filed an answer [Docket No. 18]  
3 to the complaint and a motion [Docket No. 19] to dismiss the  
4 complaint as against "Nurse Jackie," whom they asserted could  
5 not be identified, on March 20, 2008. The motion to dismiss  
6 filed March 20, 2008, is still pending before the Court.<sup>1</sup>

7           On March 25, 2008, the Court issued a scheduling order,  
8 requiring all motions to amend the complaint or to add  
9 additional parties be filed no later than June 27, 2008. See  
10 Docket No. 21.<sup>2</sup> On July 28, 2008, Plaintiff lodged a proposed  
11 first amended complaint. See Docket No. 57. Defendants contend  
12 the motion to file an amended complaint at Docket No. 56, styled  
13 as a motion to "conform" to the evidence, should be denied as  
14 untimely and because it is an improper attempt to bolster  
15 Plaintiff's credibility with regard to his memory of the events  
16 in question. See Docket No. 70.

17           Rule 15(a), Federal Rules of Civil Procedure, provides  
18 that a plaintiff should be given leave to amend his complaint

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20           <sup>1</sup> On July 2, 2008, Plaintiff filed a motion [Docket No. 47]  
21 seeking an extension of the time allowed to serve Defendant "Nurse  
22 Jackie" with the summons and complaint in this matter. On August 12,  
23 2008, Plaintiff filed a pleading identifying "Nurse Jackie" as Jackie  
24 Preston, a nurse he asserts was or is employed by the Sacred Heart  
25 Medical Clinic, whose identity he has ascertained through discovery.  
26 See Docket No. 65. On August 18, 2008, Plaintiff filed a motion  
asking the Court to issue another service packet with regard to "Nurse  
Jackie". The undersigned filed an order allowing Plaintiff extra time  
to serve Jackie Preston and granting Plaintiff's motion asking the  
Court to provide another service packet to Plaintiff for Defendant  
Preston and granting Plaintiff's motion to order service on Defendant  
Preston.

27           <sup>2</sup> Plaintiff also filed a motion for summary judgment on April 21,  
28 2008, and the Court ordered Defendants were not required to respond  
to the motion for summary judgment until September 29, 2008. See  
Docket Nos. 26 & 46.

1 when justice so requires. When deciding a motion to amend, the  
2 Court's should consider the prejudice to the opposing party and  
3 the futility of allowing the amendment. See Schlachter-Jones v.  
4 General Tele., 936 F.2d 435, 444 (9th Cir. 1991). Leave to  
5 amend a complaint should be granted if it appears at all  
6 possible that the plaintiff can correct a defect in his  
7 complaint. See Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir.  
8 2000). "Thus Rule 15's policy of favoring amendments to  
9 pleadings should be applied with extreme liberality. This policy  
10 is applied even more liberally to *pro se* litigants." Eldridge  
11 v. Block, 832 F.2d 1132, 1135 (9th Cir. 1987) (internal  
12 citations and quotations omitted).

13           The handwritten *pro se* document is to be  
14           liberally construed.... [A] *pro se* complaint,  
15           "however inartfully pleaded," must be held to  
16           "less stringent standards than formal  
17           pleadings drafted by lawyers" and can only be  
             dismissed for failure to state a claim if it  
             appears "'beyond doubt that the plaintiff can  
             prove no set of facts in support of his claim  
             which would entitle him to relief.'"

18 Estelle v. Gamble, 429 U.S. 97, 106, 97 S. Ct. 285, 292 (1976)  
19 (quoting Haines v. Kerner, 404 U.S. 519, 520-21, 92 S. Ct. 594,  
20 596 (1972)).

21           However, in exercising its discretion with regard to a  
22 motion to amend a complaint filed after a responsive pleading,  
23 the Court should consider the prejudice to the opposing party  
24 and the futility of allowing the amendment. See Schlachter-  
25 Jones v. General Tele., 936 F.2d 435, 443-44 (9th Cir. 1991).  
26 "[T]he policy of allowing the amendments of pleadings must be  
27 tempered with considerations of undue delay, bad faith or  
28 dilatory motive on the part of the movant, repeated failure to

1 cure deficiencies by amendments previously allowed, undue  
2 prejudice to the opposing party by virtue of allowance of the  
3 amendment, futility of amendment, etc." Id. at 443 (internal  
4 quotations omitted).

5           The gravamen of Plaintiff's proposed amendments to his  
6 complaint is that Plaintiff switched the identities of Defendant  
7 Barron and Defendant Olague with regard to which Defendant  
8 actually fired the pepper spray and which Defendant was  
9 responsible for improperly adjusting the pepper spray cannister  
10 that was used on Plaintiff. The undersigned concludes Plaintiff  
11 should be allowed to amend his original complaint to correct  
12 facts which were revealed during discovery, particularly because  
13 Plaintiff does not seek to add facts but to correct factual  
14 statements regarding the identity of defendants. However, the  
15 proposed amended complaint does not state any basis for  
16 liability or any factual claims regarding Defendant Arpaio or  
17 Defendant Preston.

18           Plaintiff's amended complaint may not incorporate any  
19 part of his original complaint by reference and supercedes his  
20 original complaint. Therefore, the granting of Plaintiff's  
21 motion for leave to file an amended complaint would preclude  
22 Plaintiff from proceeding with his claims against Defendant  
23 Arpaio and Defendant Preston, absent further pleading to again  
24 amend the complaint.<sup>3</sup> See Tellier v. Fields, 280 F.3d 69, 76

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26           <sup>3</sup> A defendant is not liable to a plaintiff for violation of the  
27 plaintiff's constitutional rights unless the defendant was personally  
28 involved in the alleged constitutional violation. See Rizzo v. Goode,  
423 U.S. 362, 371-72 (1976); Taylor v. List, 880 F.2d 1040, 1045 (9th  
Cir. 1989). The plaintiff must also establish that a defendant's  
conduct, allegedly violating the plaintiff's rights, was within their

(2d Cir. 2000); Campbell v. Towse, 99 F.3d 820, 825 (7th Cir. 1996); Lewis v. Sheahan, 35 F. Supp. 2d 633, 636 (N.D. Ill. 1999); Slater v. Marshall, 906 F. Supp. 256, 261 (E.D. Pa. 1995).

Accordingly,

**IT IS RECOMMENDED that** Plaintiff's motion for leave to amend his complaint be denied without prejudice. Plaintiff should be allowed to amend his original complaint or to file an amended complaint which corrects the original complaint as to which Defendant acted improperly in calibrating the pepper spray device used on Plaintiff and which Defendant actually fired the pepper spray device. However, because granting Plaintiff's motion and allowing the proposed amended complaint to supercede the original complaint would result in further pleading, i.e., the filing of a further amended complaint to allege causes of action against Defendant Preston and Defendant Arpaio, the undersigned recommends that Plaintiff be required to file a proposed amended complaint containing all of his factual allegations and legal causes of action with regard to each defendant within a limited period of time.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment.


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discretion and authority to control. See Taylor, 880 F.2d at 1045; Pinto v. Nettleship, 737 F.2d 130, 133 (1st Cir. 1984); Williams v. Bennett, 689 F.2d 1370, 1388 (11th Cir. 1982).

1 Pursuant to Rule 72(b), Federal Rules of Civil  
2 Procedure, the parties shall have ten (10) days from the date of  
3 service of a copy of this recommendation within which to file  
4 specific written objections with the Court. Thereafter, the  
5 parties have ten (10) days within which to file a response to  
6 the objections. Pursuant to Rule 7.2, Local Rules of Civil  
7 Procedure for the United States District Court for the District  
8 of Arizona, objections to the Report and Recommendation may not  
9 exceed seventeen (17) pages in length.

10 Failure to timely file objections to any factual or  
11 legal determinations of the Magistrate Judge will be considered  
12 a waiver of a party's right to de novo appellate consideration  
13 of the issues. See United States v. Reyna-Tapia, 328 F.3d 1114,  
14 1121 (9th Cir.) (en banc), cert. denied, 540 U.S. 900 (2003).  
15 Failure to timely file objections to any factual or legal  
16 determinations of the Magistrate Judge will constitute a waiver  
17 of a party's right to appellate review of the findings of fact  
18 and conclusions of law in an order or judgment entered pursuant  
19 to the recommendation of the Magistrate Judge.

20 DATED this 4<sup>th</sup> day of September, 2008.  
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26 Mark E. Asper  
27 United States Magistrate Judge  
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